No. 1415

In the
Supreme Court of the United States
OCTOBER TERM, 1946

A. G. COLLINS and NOLA Z. COLLINS,
Petitioners,

VERSUS

UNITED STATES OF AMERICA and EMMA LEE COLLINS
now McCrummen,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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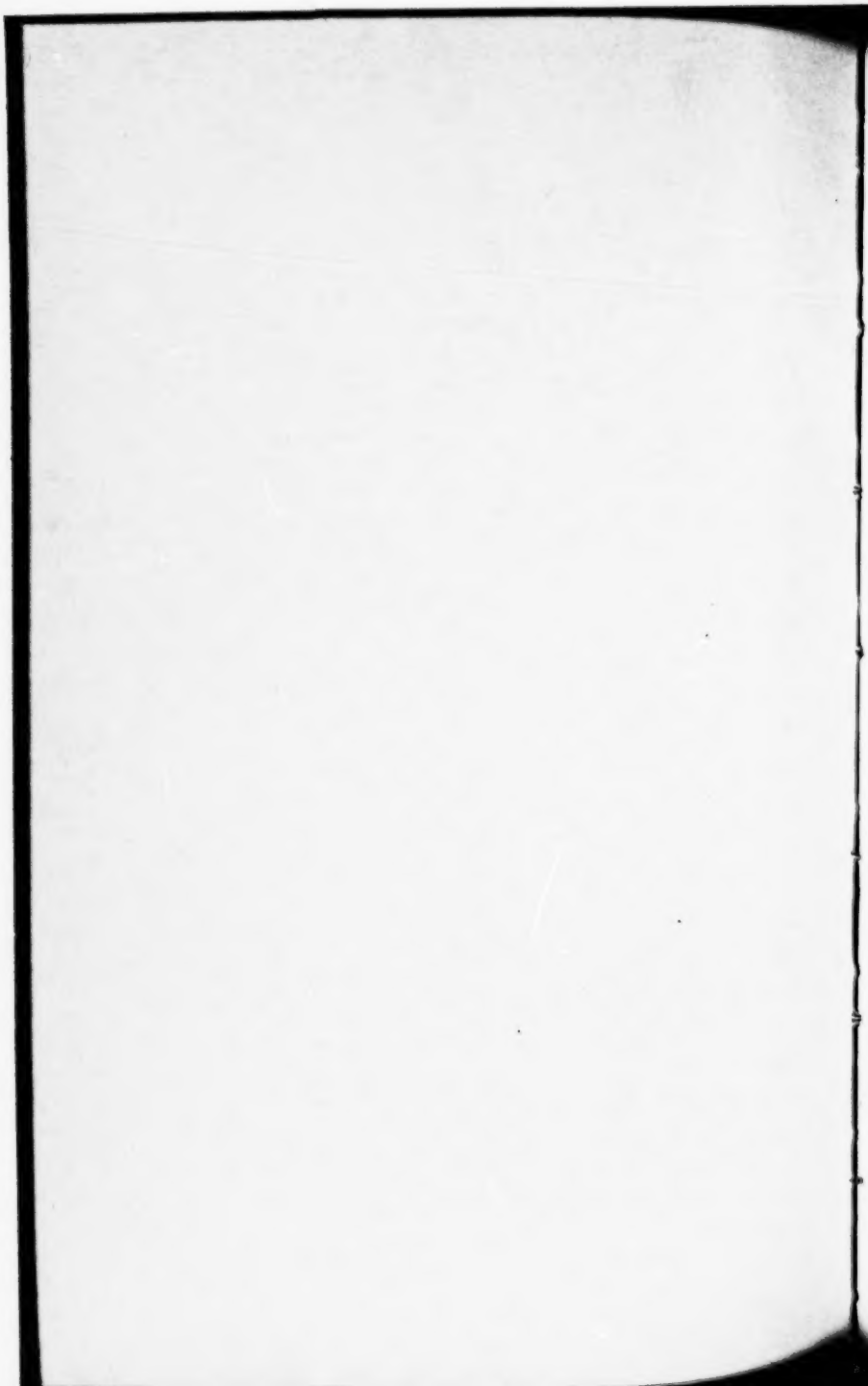

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PETITION FOR WRIT OF CERTIORARI

Requiring the United States Circuit Court of Appeals for the Tenth Circuit to Certify to the Supreme Court of the United States, for Its Review and Determination, the Case of Emma Lee Collins now McCrummen, Appellant, vs. United States of America, A. G. Collins and Nola Z. Collins, Appellees, No. 3414.

To the Honorable Fred W. Vinson, Chief Justice, and the Associate Justices of the Supreme Court of the United States of America:

Your petitioners respectfully show:

I.

Summary Statement of the Matter Involved

This action involves the benefits of a $10,000 National Service Life Insurance Policy issued to Warren G. Collins. He was killed in an accidental plane crash while a flying officer instructor in the army at Pecos, Texas, army airfield in December, 1943.

He was single when he entered the army and designated his father and mother, A. G. Collins and Nola Z. Collins, as principal and contingent beneficiary respectively of his insurance.

On April 27, 1942, in contemplation of his marriage to Emma Lee Smalley, he obtained and filled out form 336, directing the Veterans Administration to change the beneficiary of his insurance to his wife Emma Lee Collins. On the following day he married Emma Lee Smalley.

At the time of the marriage, he was stationed at Mather Field, California; some months prior to his death, he was transferred to Pecos, Texas, army airfield, where he remained until his death. His wife was with him. He was a commissioned officer and they lived in a home or apartment at Pecos, Texas, near the airfield. He was never stationed outside of the United States or in combat zone during any of this time, nor during his army service.

Insured never forwarded the notice of change of beneficiary to the Veterans Administration, as required by regulation in order to make it effective.

After his death the wife found the notice of change at their home. After correspondence with the Veterans Administration, she sent same in to the Administration about two

and a half months after the death of insured. She was permitted to testify that several months prior to his death, insured showed her the notice of change in their home and told her that if anything happened to him to give same to her father, who would know what to do with it.

A carbon copy of such notice of change of beneficiary was found also in insured's office desk by the army officer appointed to take charge and dispose of his personal effects, which was later forwarded to the wife but was never offered in evidence.

The death of insured occurred on December 14, 1943; the notice of change of beneficiary was received by the Veterans Administration February 26, 1944. This was the first receipt by the Administration of any notice of change. The reason given for not forwarding the change of beneficiary sooner was that neither the wife nor her father knew that it was necessary.

II.

Provision for Change of Beneficiary

The applicable regulation as to change of beneficiary was:

> "A change of beneficiary to be effective must be made by notice in writing, signed by the insured and forwarded to the Veterans Administration by the insured or his agent * * *." (Tr. 9, 24)

This regulation was promulgated by the Veterans Administration pursuant to statute, and had the force of law, and by statute was made a part of the insurance contract.

III.

Award of the Veterans Administration

Both the wife and the father filed claim with the Veterans Administration for the insurance benefits; the father as original beneficiary, and the wife claiming as substituted beneficiary under the alleged change of beneficiary. The Veterans Administration by its letter of June 18, 1945, to the wife, awarded the insurance to the father, stating:

> "* * * Careful consideration has been given to all of the evidence in the file and it has been determined that there was no valid and completed change of insurance beneficiary, that the claim of the father should be allowed, and your claim should be denied."

IV.

Decision of the Trial Court

Under authority of Title 38, U.S.C.A., Sec. 445, as amended by Section 617 of the National Service Life Insurance Act of 1940, the wife Emma Lee Collins now McCrummen as plaintiff sued the father and mother A. G. Collins and Nola Z. Collins, and the United States of America, as defendants, in the United States District Court for the Eastern District of Oklahoma to recover the benefits of the policy. That Court had proper jurisdiction.

The trial Court found and concluded:

> "It is my conclusion from the evidence and the law as declared in Bradley v. United States, et al., 143 Fed. (2) 573, that the plaintiff did not sustain the burden of showing that the insured, during his lifetime, effected a valid change of beneficiary from his father to her; that under the law and the evidence, the father, A. G. Collins, is the beneficiary of said insurance." (Tr. 24)

V.

Decision of Circuit Court of Appeals

Upon appeal by Emma Lee Collins now McCrummen to the United States Circuit Court of Appeals, Tenth Circuit, that Court having proper jurisdiction rendered its decision and judgment (Tr. 29-38) on March 17, 1947, reversing the trial Court, holding that there had been change of beneficiary to the wife, and ordering the trial Court to award the insurance to the wife, Emma Lee Collins, appellant, this being the decision and judgment herein complained of. The decision has not yet been reported.

VI.

Jurisdiction of This Court to Review the Judgment

The jurisdiction of this Court is invoked under Title 38, U.S.C.A., Sec. 347(a), providing that in any case in a circuit court of appeals, it shall be competent for the Supreme Court of the United States, upon proper petition, to issue the writ of certiorari.

This petition for writ of certiorari has been filed prior to the expiration of three months from the date of the decision and judgment of the Circuit Court of Appeals, as required by Title 28, U.S.C.A., Sec. 350.

VII.

The Questions Presented

1. The Circuit Court of Appeals erred in holding that there had been completed change of beneficiary, under the law and the facts, because the regulation required that in order to be effective the written notice of change of benefi-

ciary must be forwarded to the Veterans Administration by the insured or his agent. It is conceded that the insured did not do this. Under the facts it clearly appears that such notice of change was not forwarded by the agent of the insured as contemplated by the regulation.

2. The Circuit Court erred in assuming that the provisions of the insurance contract with reference to change of beneficiary were ambiguous and that therefore same could be disregarded. (Tr. 32)

3. Such Court erred in holding that literal compliance with the provisions of the policy for the change of beneficiary is not necessary, and by holding in effect that this insured had done everything reasonably necessary to accomplish the change. (Tr. 33)

4. It erred in holding that the "forwarding' of the notice of change of beneficiary was a ministerial act, and erred in failing to hold that such requirement was an "essential part of the contract" and was a "required affirmative act" on the part of the insured, by himself or duly authorized agent, in order to make the change effective.

5. It erred in holding that the Court should under the equitable principle treat that as done which ought to be done, thus effectuating the intent of the insured, and ordered the change. The Court overlooked the fact that such equitable principle should be invoked only if and when the insured has done everything that he could reasonably have been expected to do under his own existing circumstances to carry out the regulations and requirements as to change of beneficiary; the Court wrongfully assumed that the insured here had done everything that he could reasonably have been expected to do under his own existing circumstances

to carry out each step of the regulation; the decision of the Court is based on legal authorities where the facts were entirely different and where the insured in those cases had done all that he could reasonably have been expected to do to make the change but had been prevented by matters beyond his control from literally carrying out the provisions of the regulations.

6. The Court erred by holding in effect that the facts herein amounted to a forwarding of the notice by the wife as agent for the insured, because insured did not create any such agency under the wife's own evidence and because the general law of agency must apply to the regulation and the wife could not act as agent of the insured after his death, since his death revoked the agency as to any act which had not been done prior thereto.

7. The Court erred in holding that it was not necessary that the insured himself or by agent "forward' the notice of change of beneficiary to the Veterans Administration (Tr. 34). The Court erroneously based such holding on authorities which held, in effect, that the "receiving" of the notice of change, and the "endorsement" of such change on the policies, were ministerial acts which could be waived or performed after the death of the insured. We concede such authorities are correct, but same are not applicable here. If the insured had either himself or by agent "forwarded" the notice of change to the Administration, or started it on its mission by his own affirmative act, or had done all that he could to do so but had been prevented by matters beyond his control from so doing; why then, the receipt of the notice by the Administration and the endorsement of the change on the policy, being merely ministerial or administrative acts, not involving discretion or decision, could occur after the death of insured.

8. The Court erred in holding that the new designation (of beneficiary) was complete when the insured executed the precise completed form provided for such purpose and the Veterans Administration was bound to recognize it, no matter by whom it was called to its attention.

9. The Court erred by reasoning and holding that under the regulation considered in its entirety, it appeared that the requirement that the notice of change of beneficiary be forwarded by the insured or his agent could be disregarded.

10. The Court erred in holding that the Government could waive and had waived the requirement that the notice of change be forwarded to the Veterans Administration by the insured or his agent. Such requirement not being a mere ministerial act, but an essential part of the contract requiring decision, could not be waived.

VIII.

Reasons Relied on for Allowance of Writ

1. The requirement in this regulation that the notice of change of beneficiary be forwarded to the Veterans Administration by the insured or his agent, is an entirely new one. It was promulgated under the provisions of the National Service Life Insurance Act of 1940. Provisions under the War Risk Insurance policies issued during World War I, did not make this requirement, but only required that notice of the change of beneficiary be in writing and signed by the insured. The regulation is plain and unambiguous and is a reasonable one. We think it means just what it says, and that it cannot be disregarded except in those cases were it can be said from the facts that the insured intended to

change his beneficiary and did all that he reasonably could do to follow the regulation but was prevented from so doing by something beyond his control. The interpretation or construction of this new provision as to change of beneficiary is not involved in any of the former Federal Court decisions on the subject, and was considered for the first time in the recent case of *Bradley* v. *United States, et al.*, 143 Fed. (2d) 573, decided by the Circuit Court of Appeals, Tenth Circuit, in May, 1944, certiorari denied, Jan. 2, 1945, 323 U. S. 793, 65 S. Ct. 429. The Circuit Court of appeals herein has decided important questions of Federal law which have not been, but should be, settled by this Court.

2. The said Circuit Court of Appeals in *Bradley* v. *United States, et al., supra,* held in effect that the regulation herein involved had the force of law, was an essential part of the insurance contract, requiring discretion and decision, not merely an administrative detail, and that it could not be waived or disregarded but must be complied with to create change of beneficiary unless the insured fully intended to change beneficiary and has done everything in his power to accomplish this purpose, leaving only ministerial acts to be performed by the insurer. In this case the same Circuit Court of Appeals decided similar questions apparently in conflict with its own decision in the *Bradley* case, in that it held here that the requirement that the notice of change be forwarded to the Administration by the insured or his agent, did not have to be met, that it could be disregarded and waived.

3. The said Circuit Court of Appeals in its decision herein has decided questions in conflict with decisions in principle of other Circuit Courts of Appeals, and in a way probably in conflict with applicable decisions of this Court.

4. Said Circuit Court failed to distinguish between those cases where an insured soldier was in foreign service, or in combat zones, and exhibited a clear intention to change his beneficiary and also did all that he could then do under his then situation to comply with the regulations but was prevented from doing so by matters beyond his control, and cases like this one where the insured was a commissioned officer living practically on a civilian basis and with ample opportunity to comply with the regulation.

5. There are many thousands of these National Service Life Insurance policies now held and which will be continued in force by civilian citizens formerly soldiers in the service of their country. The Veterans Administration has promulgated this regulation, looking toward the creation of a rule by which it could readily be ascertained whether in a given case a change of beneficiary has been effected. This regulation is reasonable. It only requires as the final, positive, affirmative act of the insured, that he himself or by agent forward or mail the notice of change in to the agency of the government which handles such insurance. It guards against putting into effect notices of change which a holder of one of these policies might have executed, but have later concluded not to forward and make it effective. It recognizes that an insured might fully intend to make a change of beneficiary when he wrote the notice directing such change, but that such intention did not continue and that he later changed his mind and intention in that respect. The holders of these policies as well as the Veterans Administration are entitled to have a clear cut dicision and announcement of the rule to be followed in view of this regulation. The decision of the Circuit Court of Appeals herein in the respects herein set forth on the questions herein

mentioned, has so far departed from the accepted rules of law as to call for an exercise of this Court's power of supervision.

IX.

Record

Copies of the Transcript of Record in this case in the Circuit Court of Appeals for the Tenth Circuit, are filed herewith in conformity with Rule 38 of this Honorable Court.

PRAYER

Wherefore, petitioners pray that a writ of certiorari issue to the Circuit Court of Appeals for the Tenth Circuit, requiring said Court to certify and send to this Court a full and complete Transcript of the Record and all proceedings of said Circuit Court had in the case numbered and entitled on its docket, No. 3414, Emma Lee Collins, now McCrummen, Appellant, vs. United States of America, A. G. Collins and Nola Z. Collins, Appellees, to the end that said case may be reviewed and determined by this Court, as provided by the statutes of the United States, and that the judgment of the United States Circuit Court of Appeals in said case be reversed by this Court, and for such other relief as to the Court seems proper.

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Brief in Support of Petition for Writ of Certiorari

I.

The Opinion of the Court Below

This petition prays for a review of the decision and judgment entered on March 17, 1947, by the Circuit Court of Appeals, Tenth Circuit, in the case of Emma Lee Collins now McCrummen, Appellant, vs. United States of America, A. G. Collins and Nola Z. Collins, Appellees, No. 3414. The opinion of the Circuit Court of Appeals appears at pages 29-38 of the Transcript of the Record herein. It has not yet been officially reported.

II.

Jurisdiction

The jurisdiction of this Court is invoked under Title 38, U.S.C.A., Sec. 347(a) providing that in any case in a circuit court of appeals, it shall be competent for the Supreme Court of the United States, upon proper petition, to issue writ of certiorari.

The petition for the writ herein and this supporting brief has been filed prior to three months from the date of the decision and judgment of the Circuit Court of Appeals, as required by Title 28, U.S.C.A., Sec. 350.

III.

Statement of the Case

The nature of the case and the facts therein and ruling of the Circuit Court of Appeals for the Tenth Circuit have already been set forth in the foregoing petition for the writ

of certiorari, which is adopted as a part of this supporting brief.

IV.

Specification of Errors

The errors of the Circuit Court of Appeals in such decision are pointed out and enumerated in the petition for the writ herein, under the heading "The Questions Presented", pages 6-8 hereof, and for brevity will not be repeated herein.

V.

Reasons Relied on for Allowance of Writ

Likewise same are set out in the petition for the writ herein, pages 8-11 and are not here repeated.

VI.

Statutes and Regulations as to Change of Beneficiary

38 U. S. C. A. 801(g):

> "The insured shall have the right to designate the beneficiary or beneficiaries of the insurance * * * and shall, *subject to regulations,* at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries * * *."

38 U. S. C. A. 808:

> "The Administrator, subject to the general direction of the President, shall administer, execute, and enforce provisions of this chapter, shall have the power to make such rules and regulations, not inconsistent with the provisions of this chapter, as are necessary or appropirate to carry out its purposes, and shall

decide all questions arising hereunder." (All emphasis herein is ours.)

The applicable regulation of the Veterans Administration in force at the time is as follows:

> "A change of beneficiary may be made by the insured at any time without the knowledge or consent of the previous beneficiary, except that no change of beneficiary may be made by last will and testament. An original designation of beneficiary may be made by last will and testament duly probated. *A change of beneficiary to be effective must be made by notice in writing signed by the insured and forwarded to the Veterans Administration by the insured or his agent,* and containing sufficient information to identify the insured. Whenever practicable such notices shall be given on blanks prescribed by the Veterans Administration. Upon receipt by the Veterans Administration, a valid designation or change of beneficiary shall be deemed to be effective as of the date of execution: Provided, That any payment made before proper notice of designation or change of beneficiary has been received in the Veterans Administration shall be deemed to have been properly made and to satisfy fully the obligations of the United States under such insurance policy to the extent of such payments." (Tr. 9, 24, 33)

The regulation and requirement that the notice of change of beneficiary to be effective must be "forwarded to the Veterans Administration by the insured or his agent" is an entirely new regulation, never before 1940 appearing in any government insurance policy. None of the older reported cases on change of beneficiary of government insurance policies are upon regulations as to such change containing this express provision. For instance the old regulation as to change of beneficiary under war risk insurance and converted government policies provide that "Every

change of beneficiary must be made by notice, signed by the insured, to the Bureau of War Rick Insurance at its office in Washington, D. C."

The case of *Bradley* v. *United States, et al.*, 143 F. (2d) 573, was decided by the Circuit Court of Appeals, Tenth Circuit, in 1944. It was, so far as we have been able to ascertain, the first case before any circuit court of appeals in which this exact regulation was involved. Therein it is stated by the Court (p. 576):

> "The manifest purpose of the foregoing regulation is to create a legal standard for the orderly administration of the Act by providing a means and method for the exercise of the statutory right of the insured to change the beneficiary of his insurance and to protect the insurer against conflicting claims for the proceeds of the policy. See Claffy v. Forbes, D. C., 280 F. 233; Peart v. Chaze, D. C., 13 F. 2d 908; Chichiarelli v. United States, D. C., 291 F. 238."

There were a multitude of cases arising under the government insurance policies issued during World War I, practically all of them upon the question as to whether there had been a change of beneficiary or not.

It is our thought that the presently involved regulation was promulgated for the express purpose of requiring, as a discretionary and the final act of the insured, by himself or by agent, the sending in or forwarding of the notice of change of beneficiary to the agency which has charge of such insurance matters; and in order to avoid complications; and that it was clearly intended that this was a reasonable and one of the required steps necessary to complete change of beneficiary. It was made a part of the regulation as to change of beneficiary to create a legal standard for the

orderly administration of the insurance act. No doubt to help avoid the many cases which arose under the old regulation.

How Government Insurance Contracts to Be Construed

In *Konovich* v. *United States*, 29 F. (2d) 661, the Circuit Court of Appeals, Sixth Circuit, says:

> "The War Risk Insurance Act was intended to afford the soldier the advantages of ordinary life and accident insurance, which were no longer reasonably available to him and being substitute insurance, *such Government contracts are to be construed by the same rules as like contracts involving private parties* and the jurisdiction conferred on the courts to adjudicate such contracts must be exercised in accordance with the laws governing the usual procedure of the court in actions for money compensation."

It is stated in *Law* v. *United States*, 290 Fed. (Dist. Ct. Montana) 972:

> "The War Risk Insurance Act in its insurance feature was intended to afford the soldier the advantage of the ordinary life and accident insurance which was no longer reasonably available to him, and being a substitute for such insurance, *the government contracts are to be construed by the same rules as like contracts involving none but private parties.*"

Affirmed by the Supreme Court of the United States, *Law* v. *United States*, 45 S. Ct. 175, 266 U. S. 494, 69 L. ed. 401.

Thus we see that the words of this regulation are to be given their regular meaning, even though we are dealing with insurance contracts granted by a government to its soldiers. And that the decisions and interpretations of the Courts with reference to private insurance contracts are applicable here.

The provisions of this regulation are plain and unequivocal. Its meaning is clear and certain. By it there are two necessary steps to be taken by an insured to complete change of beneficiary: 1st, he is required to make out a written notice to change the beneficiary; and 2nd, such notice must be forwarded to the Veterans Administration by the insured or his agent. It is our contention under the facts and circumstances here, the insured never having been in foreign service or in the combat zone while in the army, but stationed at all times in domestic service, first in California and then in Texas, he being a commissioned officer living outside military camp, practically on civilian status, that he was required to both prepare written notice of change and to forward same to the Administration by himself or agent before his change of beneficiary was completed.

This requirement that the notice be forwarded by the insured or his agent was not merely a ministerial act, but it was an act involving discretion and final decision. A ministerial act is one which does not involve either discretion or decision, like the recording of the change of beneficiary on the insurance records when it is received in the required manner.

The very statute which gives the insured the right in these cases to change his beneficiary, gives him that right "subject to regulations", in other words he has the right to make the change upon the condition that he does so in the manner provided by regulations.

When May Regulations Be Disregarded

It is conceded by all that mere intention alone, no matter how strong, is not sufficient to make the change. But in some of the cases that which is referred to as the equita-

ble rule is invoked to give effect to an uncompleted change of beneficiary. There it is held that beneficiary change provisions of the insurance contract must be complied with, unless in addition to clear intention to make the change, it be further shown that insured has done all that he could to comply with the conditions, and been prevented by circumstances beyond his control from meeting the requirements.

Gifford v. *United States*, 289 Fed. 833;
Reid v. *Durobaw*, 272 Fed. 99;
Bradley v. *United States*, *supra*.

In the *Gifford* case, it was pointed out that the insured was a soldier and that government insurance was involved. The Court said that in view of the unusual circumstances surrounding soldiers in the army and their restricted freedom of action, a liberal rule should be adopted in construing their acts in relation to their insurance. The Court nevertheless held in that case that sufficient had not been done to amount to change of beneficiary.

If a soldier in foreign service, in combat zone, absent from mail facilities, should have indicated his intention to change the beneficiary of his insurance by any form of written instrument, and if he had no opportunity to mail or forward it before his death in battle, then clearly this would be such a case where equity should consider that as done which ought to be done and order the change effected. We have no such case here. The insured here was in the army but in domestic service, living practically a civilian life, an officer flyer, afforded ample opportunities to have forwarded the notice of change as required. It cannot be

said that he did all that he could do to meet the requirement of forwarding the notice of change of beneficiary, nor was he shown to have been prevented by circumstances beyond his control from meeting the condition. Therefore, the equitable rule cannot be properly applied to this case.

In *Doering* v. *Buechler*, 146 Fed. (2d) 784, CCA 8th Circuit, the Court said (787):

> "The general rule is that an insured, in making a change of beneficiary, *must follow the method prescribed in the policy.* Vanasek v. Western Bohemian Fraternal Ass'n, 122 Minn. 273, 278, 279, 142 N. W. 333, 49 L. R. A., N. S., 141, Ann. Cas. 1914D, 1123; Vance on Insurance, 2nd Ed., page 569; 29 Am. Jur., Insurance, Sec. 1315; Reid v. Durobaw, 4 Cir., 272 F. 99, 101."
>
> "An exception to the general rule is 'that when the insured with the clear intent to change the beneficiary *does everything in his power to effect a change,* the mere fact he is unable to surrender the policy for indorsement of the insurer's consent because it is in the possession of a third person who will not surrender it, or for any other reason is beyond the insured's control, will not render the change invalid.' "

This Regulation Essential Part of the Contract, Not Mere Ministerial or Administrative Act, and It Cannot Be Waived

Attention is called to the case of *Sun Assur. Co. of Canada* v. *Sutter*, (Wash.) 95 Pac. (2d) 1014, where it is stated:

> "As the insurer never noted any change of beneficiary upon the policies prior to the death of insured, a court of equity will order a change in beneficiary *only if it appears that the insured, during his lifetime did everything necessary to effectuate the change,* nothing remaining for the insurer to do, save

purely ministerial acts. 2 Couch Cyc. of Ins. Law 867, Sec. 315a; also 907, Sec. 323."

Because it so clearly illustrates our contention, being familiar local law to us, we quote from *Harjo* v. *Fox*, decided by the Oklahoma Supreme Court in 1944, 146 Pac. (2d) 298:

> "The general rule is that where the insured has done all in his power to effect a change of beneficiaries, and after his death only *ministerial acts* remain to be performed, the courts may regard that as done which ought to have been done and treat the nonperformance of such ministerial acts as immaterial. 37 C.J. 585; 29 Am. Jur. 985; 78 A.L.R. 947 note; New York Life Ins. Co. v. Wilson, 181 Okla. 363, 73 P. 2d 1133. *But this rule does not apply where the acts remaining to be performed after the death of the insured are not merely ministerial but involve the exercise of discretion.* 37 C.J. 586; Ringler v. Ringler, 156 Md. 270, 144 Atl. 221; Freund v. Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283; Sheppard v. Crowley, 61 Fla. 735, 55 So. 841; State v. Mutual Life Assur. Co. v. Bessett, 41 R.L. 54, 102 Atl. 727, L.R.A. 1918 C 961.
>
> "In the case of State v. Mutual Life Assur. Co. v. Bessett, above, the Court said that the question to be decided in such a case is 'whether the acts required, but unperformed, were *essential parts of the contract* or were ministerial and formal details.' "
>
> "There is sound reason for this distinction between *ministerial* and *non-ministerial* acts. The *rights of a beneficiary* under a life contract *vest and become fixed upon the death* of the insured. Carson v. Carson, 166 Okla. 161, 26 P. 2d 738; 37 C.J. 580, 581; 29 Am. Jur. 952, Ringler v. Ringler, above; Freund v. Freund, above. The nonperformance of a purely ministerial act can have no effect upon such rights. The only person having discretionary power to decide who the beneficiary shall be has already made

his choice. *The ministerial acts remaining to be performed are a matter of certainty, requiring only time for their completion. On the other hand, discretionary acts determine who the beneficiary is to be, and if their performance were permitted after death of the insured, the rule that the rights of the beneficiary are fixed at such time would be destroyed,* for the question of who the beneficiary was to be would depend upon a discretionary decision to be made after the death of the insured."

"Plaintiff finally contends that the provisions of the policy relating to change of beneficiary were for the sole benefit of the company, and that the company waived the same by paying out the proceeds of the policy after the death of the insured. We are committed to the rule that the rights of a third person, named as beneficiary in an insurance policy such as this, vest upon the death of the insured, and that the insurer may not after the death of insured, destroy such vested rights by waiving its rights to insist on the provisions of the policy with reference to a change of beneficiary. Carson v. Carson, above."

Quoting from the case of *Bradley* v. *United States, et al,* decided by the Circuit Court of Appeals, Tenth Circuit in May, 1944, reported in 143 Fed (2) 573:

"The National Service Life Insurance Act of 1940 specifically authorized the insured to designate his mother as the beneficiary of his insurance, and 'subject to regulations' it also authorized him to change the beneficiary to his wife without the consent of his mother. 54 Stat. 1009, 38 U.S.C.A. Sec. 802(g). The applicable regulation governing the right to change the beneficiary, as promulgated by the Administrator in pursuance of his statutory authority, 54 Stat. 1012, 38 U.S.C.A. Sec. 808, pertinently provides " * * a change of beneficiary to be effective must be made by notice in writing signed by the insured, and forwarded to the Veterans' Administration by the in-

sured or his agent, and must contain sufficient information to identify the insured. Whenever practical such notices shall be given on blanks prescribed by the Veterans' Administration. Upon receipt by the Veterans' Administration, a valid designation or change of beneficiary shall be deemed to be effective as of the date of execution * * *.' The manifest purpose of the foregoing regulation is to create a legal standard for the orderly administration of the Act by providing a means and method for the exercise of the statutory right of the insured to change the beneficiary of his insurance, and to protect the insurer against conflicting claims for the proceeds of the policy, See Claffy v. Forbes, D. C., 280 F. 233; Peart v. Chaze, D. C., 13 F. 2d 908; Chichiarelli v. United States, D. C., 26 F. 2d 484; Farley v. United States, D. C., 291 F. 238.

"When the policy of insurance matured by the death of the insured on August 21, 1941, the Veterans' Administration had not received any notice in writing, signed by the insured, directing a change of beneficiary of his insurance, and *none had been forwarded to the Administration by the insured or his agent.* The mother was the recorded beneficiary, and was therefore presumptively entitled to the proceeds of the policy. The burden is upon the widow who claims as a substituted beneficiary to show that the insured during his lifetime effected a valid change of beneficiary from his mother to her. Leahy v. United States, 9 Cir., 15 F. 2d 949. Cf. Zolintakis v. Orfanos, 10 Cir., 119 F. 2d 571; Brown v. Union Central Life Ins. Co., Tex. Cir. App., 72 S.W. 2d 661; in re Burton's Estate, 116 Pa. Super. 249, 176 A. 819; Kochanek v. Prudential Ins. Co. of America, 262 Mass. 174, 159 N.E. 520. Strict compliance with the applicable regulations is not however requisite to the maintenance of that burden of proof. It is the generally accepted rule in cases involving policy provisions for change of beneficiary, that if the insured has manifested a desire and intent to change the

beneficiary of his insurance, *and has done everything reasonably within his power* to accomplish this purpose, leaving only ministerial acts to be performed by the insurer, courts of equity will treat as done that which ought to be done, thereby giving effect to the intent of the insured."

* * * * * * * *

"The expressed intention of the insured to change the beneficiary, standing alone and unaccompanied by some affirmative act, having for its purpose the effectuation of his intention, is insufficient to effect a change of beneficiary and the courts cannot act when he has not first attempted to act for himself. Spurlock v. Spurlock, 271 Ky. 70, 111 S.W. 2d 443; Parks' Ex'rs v. Parks, 288 Ky. 435, 156 S.W. 2d 480; Kochanek v. Prudential Ins. Co. of America, 262 Mass. 174, 159 N.E. 520; Equitable Life Assurance Society v. Arnold, D. C., 27 F. Supp. 369. Cf. Fink v. Fink, 171 N.Y. 616, 64 N.E. 506. We can only liberally construe that which he has attempted to do in his own behalf, but for some reason has failed to accomplish the desired or intended result. *This is a fundamental rule of equitable jurisprudence which guides and directs equitable proceedings.*"

* * * * * * *

"The Administration may of course waive the technical requirements for its own protection, *but it may not thereby adjudicate the question whether a valid change of beneficiary has been effected in accordance with the prescribed means and methods which is the legal standard for that purpose.* Cf. Rasmussen v. Mutual Life Ins. Co., supra; Metropolitan Life Ins. Co. v. Jones, 307 Ill. App. 652, 30 N.E. 2d 937; Parks' Ex'rs v. Parks, supra, 288 Ky. 435, 156 S.W. 2d page 486."

Opinion of the Circuit Court of Appeals

We agree with language of the Circuit Court herein (Tr. 32):

> "The situation, then, is this—when the insured died, his father was the recorded beneficiary in the policy. The Veterans Administration had received no notice of a change of beneficiary. The burden therefore rested upon anyone claiming as a substituted beneficiary to show that the insured during his lifetime had effected a valid change of beneficiary. Whether appellant met this burden is the only question in this case."

> "Insurance policies are contracts between the insured and the company. The parties are free to make any contract they may choose, not prohibited by law, *and when once they have made their contract they will be bound thereby,* and when the contract is free from ambiguity, the court has no latitude in interpreting or enforcing its provisions. It is only where there is ambiguity in some of the provisions of the agreement that the equitable powers of the court may be invoked in construing the contract in a light most favorable to the insured."

We find fault with the Court's inferring by these last statements that there is some ambiguity in the provisions of this policy with respect to the requirements to change the beneficiary thereof, because there is no such ambiguity. The authorities cited to support this proposition are no way in point.

Continuing with the words of the Circuit Court in its opinion (Tr. 33):

> "It has been held without exception that a mere intent to change a beneficiary is not enough. Such an intent must be followed by positive action on the

> part of the insured evidencing an exercise of the right to change the beneficiary. Where the courts diverge is as to the degree of affirmative action necessary to effect a change. Literal compliance with the provisions of a policy for the change of a beneficiary is not necessary. It is a general rule that where the insured has manifested an intent to change a beneficiary and has done everything reasonably necessary to accomplish a change, *leaving only ministerial acts* to be performed, courts of equity will treat as done that which ought to be done, thus effectuating the intent of the insured."

The Court here correctly stated the rule, but incorrectly applied it to the facts in this case. In its very nature, the requirement that the notice of change after it had been written and signed be forwarded to the Veterans Administration by the insured or his agent, was not a mere ministerial act. It was an affirmative act required to be performed by the insured or his agent. It involved decision and discretion. It was not a mere administrative detail or a ministerial act. It was the last necessary step to be taken by the insured under the regulation, but none the less necessary.

Let us refer here to the six cases cited in support of the position of the Circuit Court in its last quoted statement.

First is the Bradley case, 143 Fed. (2) 573, from which we have quoted above at length. It does not lend support to the statements of the Court. It plainly holds that it is only where nothing remains to be done except ministerial acts that the regulation can be waived. It does not hold that the forwarding of the written notice of change is a ministerial act which can be waived. On the other hand, it expressly holds that:

> "The Administration may of course waive the technical requirements for its own protection, *but it may not thereby adjudicate the question whether a valid change of beneficiary has been effected in accordance with the prescribed means and methods which is the legal standard for that purpose.* Cf. Rasmussen v. Mutual Life Ins. Co., supra; Metropolitan Life Ins. Co. v. Jones, 307 Ill. App. 652, 30 N.E. 2d 937; Parks' Ex'rs v. Parks, supra, 288 Ky, 435, 156 S.W. 2d page 486."

In the Bradley case the change of beneficiary was insufficient for two reasons: 1st, because the instrument relied on was held *not to be sufficient* as a notice or direction to change the beneficiary, and 2nd, because it was not *forwarded to the Veterans Administration by the insured or his agent* as required by this same regulation. Both these deficiencies existed in the Bradley case, and were therein pointed out and discussed. In our case, the notice itself was proper and sufficient, but it has the 2nd deficiency, that it was not forwarded to the Administration by the insured or his agent, which renders it fatally defective, and there are not sufficient facts shown to justify invoking the equitable rule that insured did all that he could do to perform the condition.

The next case relied on by the Circuit Court is *Roberts* v. *U. S.*, 157 Fed (2d) 906, CCA, 4th Circuit, 1946 There the insured was an officer in the navy, and he had filled out and signed formal notice of change of beneficiary to his wife and had directed a clerk in the administration building of the Naval Air Station to forward same through proper channels, leaving such notice of change with the clerk, which the clerk promised to do. Here was an express direction to the agent to then forward the notice of change, all shown by substantial evidence. Insured and complied with the re-

quirement that he forward the notice himself or by agent; he had done all that he could have been reasonably expected to do; and the insurance was properly awarded to his wife, regardless of whether the notice of change was sent in by the clerk or was ever received by the Administration until after the death of insured.

The Circuit Court also cites to support its holding, *Claffy* v. *Forbes*, 280 Fed 333. There the insured, a private soldier, was killed in battle in France during World War I. While he was in combat zone and just a short time before he was killed, he wrote his mother who was the beneficiary of his insurance that if he should be killed that his insurance would be paid to her $57.50 a month for 20 years, and that if his mother should not live to get it all that he wanted his neice Agnes to have the rest of it. The mother collected the insurance until her death, and it was held thereafter that by reason of the above facts, the neice was entitled to the remainder. The regulation as to change of beneficiary then in force was that the change could be made "by notice in writing to the Bureau of War Risk Insurance, signed by the insured." The Court held that the change was made in harmony with the then existing regulations. There was no express requirement then, as there is now, that the written notice of change of beneficiary be "forwarded" to the Administration by the insured or his agent.

Equitable Life Assur. Soc. v. *Baumgardner*, 55 Fed Supp. 985. The provision with reference to change of beneficiary was that the insured "may from time to time, by written notice duly filed at the Society's Home Office, change the beneficiary, but such change shall take effect only upon its endorsement on this policy by the Society." On Saturday night insured called the local agent of the in-

surance company and asked him to come to his home. The agent went and insured told him he wanted to change the beneficiary in his insurance. The agent had blank forms for such purpose in his car and he filled one out to make such change and insured signed it and delivered it to the agent, who agreed to mail it in to the home office. Insured was found dead in his home the next day (Sunday) about noon. The company agent mailed in the notice Sunday afternoon before he heard of the death of insured. The insured had done all that he could do to make the change. He had delivered the completed notice of change to the agent with instructions to mail it at once, which was done. These acts would have complied with the provisions of the policy in our case. Nothing further there remained to be done but for sufficient time to elapse for the notice to be received by the company. The notice was started on its journey to the home office by the affirmative act of the insured, from whose control it had passed by his own affirmative act while he was in life. Not so here.

It clearly appears from the following quotation from the next case cited, *Norris* v. *Norris*, 145 Fed. (2d) 99, CCA, 5th Cir., 1944:

> "The undisputed facts, as found in the record, show clearly an unmistakable intention on the part of the insured to change the beneficiary in his group annuity certificate. It was evidenced by his executing a written request for the desired change and *by his putting into motion the machinery for its filing* with the home office, *by mailing it to his employer with* instructions to have the insurance company make the change. We are of the opinion and so hold that the insured did all that the contract of insurance required him to do in order to effectuate a change of beneficiary, and nothing remained to be done except

> the purely ministerial act of making a record of the change at the home office of the company."

that such case, though cited by the Circuit Court of Appeals, does not support the conclusion it reached in this case. There the insured actually mailed, and send beyond his further control, the direction to change the beneficiary.

And neither is the final case cited and relied on by the Circuit Court applicable on fact. It is *John Hancock Mut. Life Ins. Co.* v. *Douglass,* 156 Fed. (2d) 367, CCA, Seventh Circuit 1946, the syllabi of which are as follows:

> "1. A change of beneficiary of a life policy may be accomplished without a strict compliance with the conditions of the policy regarding the endorsement of the insurer, which is purely a ministerial act that the insurer cannot refuse to perform, and a failure of insurer to perform such acts will not defeat the change if the insured has done everything within his power to effect a change.
>
> * * * * *
>
> "4. Where request for change of beneficiary of life policy was made by insured on insurer's change of beneficiary form, and form was tendered to insurer's agent for whatever action was necessary, and agent returned the form to insured's mother because form was signed with insured's initials instead of full first name of insured, and insured died suddenly before he was able to fill out new form, a change in beneficiary was effected."

Thus, it is to be seen that none of the cases relied on support the conclusion reached by the Circuit Court of Appeals in this case.

Continuing with the words of the Circuit Court in its opinion (Tr. 33):

> "Here we have more than the expressed intent of the insured to change the beneficiary. We have positive and affirmative action on his part. The insured did everything that was necessary on his part to evidence a change of beneficiary. He obtained the particular form required by the regulation. He had a civilian employee whose duty it was to assist him fill out the form as required, and signed it. Nothing remained for him to do in order to authorize the insurance company to make the change as soon as the notice came to its attention. The only other thing that remained was to bring the executed change to the attention of the insurance company, and have it record the change of beneficiary on its records."

The insured did do everything that was necessary except that he did not forward the notice of change of beneficiary by himself or agent, as expressly required by the regulation. Instead he kept the notice of change in his possession and under his control until his death. We think this regulation recognized the possibility that an insured might fill out one of these blanks, or write a letter directing new beneficiary, and then change his mind or intention in the matter. Indeed it is recognized in the decided cases that under such circumstances an insured might change his mind. As was said in *Gifford* v. *United States,* 289 Fed. 833:

> "To admit the proof offered here, or to base an opinion on it (I actually hear it, no jury being present), *would violate all established rules of evidence, and make it very easy for unscrupulous persons to perpetrate frauds upon soldiers* and other similarly situated. *The insured might well have changed his mind after writing to Miss Barnes,* or the lieutenant might have misunderstood him and drawn the wrong conclusion."

Nor does it make any difference that the insured may have thought, or that his wife may have thought, that the

change of beneficiary had been completed. As stated in *Peart* v. *Chaze*, 13 Fed. (2d) 908:

> "It is true the deceased may have thought that he had not accomplished the change, or that it was necessary for him to sign a formal application therefor, and he perhaps died with the belief that he had not succeeded. However, *this is not determinative of the matter.* The question is, not what he thought, *but did he reasonably comply with the law?* And the Court should *give effect to his purpose and intention,* if possible, *in light of what was done.*"

Insured had before him on the printed form he used for notice of change of beneficiary herein, on the face thereof, in bold faced type, the statement: *"This form, when completed, should be forwarded immediately* to the Veterans Administration, Washington, D. C." See photostatic copy of this form on pages 7-9 of the Transcript. Also there was printed on such form the regulation in full as to change of beneficiary including the requirement that the change of beneficiary "to be effective * * * must be forwarded to the Veterans' Administration by the insured or his agent, * * * (Tr. 9).

Insured was a commissioned flying officer in the United States Army.

He had a life insurance policy with a private company in favor of his father, and upon the birth of his son, insured himself wrote the company that he desired to change such policy to his son, and the company sent him formal notice of such change of beneficiary, which he himself immediately executed and returned to the company. (Tr. 23)

These matters clearly show that insured no doubt knew what was necessary to be done to complete the change of

beneficiary, but he did not do what was the final, essential act to complete the change: forward it to the Administration.

The opinion of the Circuit Court continues (Tr. 34):

> "The very narrow question in this case, then, is whether it was necessary to deliver the executed change of beneficiary to the company or at least to mail it during the life of the insured in order to constitute a valid change of beneficiary. The question must be answered in the negative. The books are replete with cases holding that a valid change of beneficiary was effected although the application for such change was not received by the company until after the death of the insured, and that is so even in cases in which the policy contained a specific provision that the change of beneficiary should not become effective until it had been endorsed by the company in the home office."

The cases cited in support of this statement are not in point. In none of them is there a provision like here involved as to change of beneficiary. They do not sustain the position assumed by the Court. They are cases wherein was involved a provision like making an endorsement on the policy as evidence of the change of beneficiary, a provision for a purely ministerial or administrative act, not involving discretion or decision. We have heretofore said that we concede the notice could reach the Administration after the death of insured: the test is whether it was sent by insured or his agent as required by the regulation.

Continuing with the opinion (Tr. 34):

> "The direction by the insured to appellant as to what she was to do with the original form 336 in the event of his death was a designation of her as his representative to do whatever was necessary to collect the insurance for herself. It is argued that this made her the insured's agent and that since such relation-

> ship is terminated by the death of the principal, her authority to transmit the designation to the insurance company was at an end when the insured died. Her right to assert her claim to the proceeds of the policy, however, does not depend upon the strict technical relationship of principal and agent or upon whether her authority as agent to act terminated with the death of the insured."

The regulation in referring to the forwarding of the notice by the agent of the insured, must have meant agency in the usually accepted sense. Of course the general law of agency would prevail and govern. What the regulation meant in common language was that the insured could send in the notice to the Administration, or he could designate his wife or any other person as his agent to do so for him. He did not do that in this case. The wife testified that he told her that if anything happened to him that she should find this notice of change and give it to her father, who would know what to do with it. It developed that the father did not know what to do with it.

There was no direction by insured to her to send it in or forward it for him then or later. The notice was during all this time kept in the possession and under the control of insured. She did not even know where the notice was at his death. Her father testified that he found it after the death of insured but that he did not know what to do with it. It was not sent in by the wife until two and a half months after the death of insured, and then only after the wife found out from the Administration that it was necessary for the notice of change to be sent in by the insured or his agent.

> "The creation of the relation of principal and agent rests in the intention of the parties. On the part of

the principal, therefore, there must be either an actual intention to appoint or an intention naturally inferable from his words or action; and on the part of the agent there must be an intention to accept the appointment and act on it, and in the absence of such intent there is generally no agency."

(2 C. J. S. 1041)

"Although the obligations of a deceased person are as a rule binding upon his estate, yet, since the authorized acts of the agent are in their nature the acts of the principal, and by legal fiction the agent's exercise of authority is regarded as an execution of the principal's continuing will, as set forth in Sec. 1 of this Title, the rule is well established both at common law and by statute that the death of the principal ordinarily terminates the agency as a matter of law in the absence of circumstances giving the agent an authority coupled with an interest. The fact that the agency is in terms irrevocable, or is declared to be binding upon the principal's heirs and personal representatives, or is expessed to be for a definite period which at the time of death has not expired, does not prevent its revocation by the death of the principal, and, of course, *an attempt to create an agency to begin at the principal's death is nugatory.*"

"The authority of the agent is terminated instantly upon the death of the principal."

(2 C. J. S. 1174-1176)

At page 547, note 36, of 2 C. J., appears the following note:

"Duckworth v. Orr, 126 N.C. 674, 36 S.E. 150 (holding that where money is delivered to one's agent, with directions to deliver the same to a third party as a gift, and the agent fails to make the delivery before his principal's death, the agency and power to deliver are thereby revoked)."

> "A delivery of personal property by the owner to an agent to deliver the same to the persons whom the owner intends to have the property does not constitute a present gift, and if the owner dies before the agent has delivered the property the agency is thereby revoked. Trubey v. Pease, 240 Ill. 513, 88 N. E. 1005, 16 Ann. Cas. 370."

The Circuit Court argues (Tr. 35) that since the regulation for change of beneficiary further states that the "change of beneficiary shall be deemed to be effective as of the date of execution", and that "any payment made before proper notice of * * * change of beneficiary has been received * * * shall be deemed to have been properly made and to satisfy fully the obligations of the United States under such insurance policy to the extent of such payments", that this recognizes the right of others than the insured to send in the notice of designation of a new beneficiary after the death of the insured. We concede that others can send in the notice of change, and that it can be received by the Administration after the death. But this does not necessarily mean that no effect whatever is to be given to the requirement that the notice of change must, to be effective, be forwarded to the Administration by the insured or his agent. Suppose, for instance, the insured regularly designated an agent to forward same for him, and the agent did so, but there was delay in transmittal of the notice by mail or otherwise, or suppose the notice of change was lost and was never received by the Administration for a long period of time or until after the death of insured. Or suppose the insured had clearly evidenced an intention to change the beneficiary and had fixed the written notice or direction that same be done, but through no fault of his own, was prevented by circumstances from forwarding same himself or by agent,

and same was not discovered or sent into the Administration until long after the death of insured. In these cases it is provided that when it is determined that such a change was made by written notice that such change shall take effect as of the date of the notice. And that the government shall be protected if it in good faith pays out money to the recorded beneficiary before it knows about a legal and proper change. It is certainly necessary that the notice of change of beneficiary be forwarded or started on its journey by insured or his agent, if the regulation means anything at all, whether it reaches its destination before the death of insured or not. The provisions are not conflicting. Under our theory, they can all be given full effect.

And last, the opinion of the Circuit Court contains the following (Tr. 37):

> "But there is yet another reason why the judgment must be reversed. The purpose of a regulation designating the manner in which a change of beneficiary under a National Life Insurance Policy should be made is for the convenience and protection of the government, *and may be waived by it.* The United States filed a brief in this court in which it takes the position that under the law and the regulations it is not necessary that the notice be mailed in by the insured or his agent during his lifetime. The government takes the position that the appellant is the lawful beneficiary and entitled to the proceeds of the policy. Even if it should be held that mailing the notice during the lifetime of the insured was required by the regulation, this requirement was waived by the position the government takes in this case."

The first position assumed by the government in this case was in its answer filed in the trial Court (Tr. 13), wherein the government makes the following allegation:

> "The complaint fails to state a claim against this defendant for which relief may be granted in that it appears from the allegations of the complaint that the deceased insured, Warren G. Collins, failed at any time during his lifetime to effect a change of beneficiary of his insurance for the purpose of naming the plaintiff as beneficiary thereof, in any amount, *in the manner required by law and regulations governing his contract of insurance.*"

But regardless of what position the government takes in this matter, that is clearly not determinative of the matter.

It was held in *Bradley* v. *United States, et al.*, 143 Fed. (2d) 573, that while the Administration may of course waive the technical requirements for its own protection, it may not thereby adjudicate the question whether a valid change of beneficiary has been effected in accordance with the prescribed means and method.

Also see *Gifford* v. *United States*, 289 Fed. 833, which states:

> "It is argued that the Director of the Bureau of War Risk Insurance, who had power to make rules and regulations, *waived the rules and regulations* in awarding the $5,000 to the mother and against the widow of the insured; but this position cannot be maintained, for the *rights of the parties* were *determined as of the date of the death*, and any waiver of rule or regulation made by the Director thereafter cannot have any retroactive effect. *The regulations*, so far as they control, *are those in effect at the time of the death of the insured, when* the *rights of the plaintiff vested.*"

And *Reid* v. *Durobaw*, 272 Fed. 99, 101:

> "But the power to change the beneficiary is a power of appointment, and the *terms* of its exercise *are fixed by the contract between the insurer and the*

insured; not alone for the protection of the insurer, but of the insured as well. *The court has no power to change that contract* by changing the conditions upon which the exercise of the power of appointment is limited. The utmost extent to which the courts have ever gone is to effectuate the intention of the insured when he has done all that he could to comply with the conditions, and has been prevented by circumstances beyond his control from meeting the requirements."

CONCLUSION

It has been necessary for us to go considerably into the merits of this case to demonstrate that the Circuit Court of Appeals in its opinion has practically disregarded its former decision in the *Bradley* case and the rules therein announced, and that such opinion is in conflict in principle with decisions of other Circuit Courts of Appeals, and has decided questions of Federal law in a way probably in conflict with applicable decisions of this Court. Certainly the Circuit Court of Appeals herein has decided in this case important questions of Federal law which have not been, but should be, settled by this Court. We urge that we have clearly shown that the reasoning and decision of the Circuit Court is unsound and unjust to these petitioners.

For these reasons, it is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power, by granting a writ of certiorari and

thereafter reviewing said decision and judgment of the United States Circuit Court of Appeals for the Tenth Circuit and reversing the same.

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May, 1947.